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Supreme Court, U.S.
FILED

No. 091322 APR 27 2010

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In the

Supreme Court of the United States

KARIM KOUBRITI,

Petitioner,

v.

RICHARD CONVERTINO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's substantive due process rights by procuring false testimony during the criminal investigation and then (2) introduced that same testimony against the criminal defendant at trial.

PARTIES TO THE PROCEEDING

Petitioner Karim Koubriti was a plaintiff in the district court and was the appellee in the Sixth Circuit. Richard Convertino was the defendant in the district court and the appellant in the Sixth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED ... 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION ... 8

I. A Deep Division Exists Among The Circuits On The Issue Of The Extent to Which A Prosecutor Is Afforded Prosecutorial Immunity For His Misconduct During The Investigative And Trial Phase Of A Criminal Prosecution. 10

II. The Sixth Circuit Failed To Recognize Convertino's Misconduct As It Pertained To The Manufacture Of False Testimony And The Subsequent Introduction Of Such Testimony At Trial. 14

CONCLUSION 18

APPENDIX

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, Filed February 3, 2010 ..... 1a

Appendix B: Order Denying Defendant's Motion To Dismiss For Failure To State A Claim, United States District Court Eastern District of Michigan Southern Division, filed December 3, 2008 ..... 27a

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,
403 U.S. 388 (1971) 5, 6

Brady v. Maryland,
377 U.S. 83 (1963) 2, 14

Buckley v. Fitzsimmons,
20 F.3d 789 (7th Cir. 1994) *cert. denied* 513 U.S.
1085 (1995) 8, 9, 10, 11, 13, 14

McGhee v. Pottawattamie County,
475 F. Supp. 2d 862 (S.D. Iowa 2007) 7

McGhee v. Pottawattamie County,
547 F.3d 922 (8th Cir. 2008) 7

Michaels v. New Jersey,
222 F.3d 118 (3d Cir. 2000) 13, 14

Pottawattamie County v. McGhee,
129 S.Ct. 2002 (2009) ..... *passim*

Zahrey v. Coffee,
221 F.3d 342 (2d Cir. 2000) ..... *passim*

Constitution

U.S. Const. amend. V 1

Statutes

18 U.S.C. § 371 2

18 U.S.C. § 2339A 2

28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Karim Koubriti respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra,* 1a) is reported at 593 F.3d 459 (6th Cir. 2010). The district court's opinion (App., *infra,* 27a) is not reported.

JURISDICTION

The Sixth Circuit entered judgment on February 3, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall *** be deprived of life, liberty or property , without due process of law***

STATEMENT

This petition addresses a important issue of federal law related to prosecutorial immunity. The circuits are divided on this issue, and this Court previously granted certiorari to resolve the conflict. See

Pottawattamie County v. McGhee, 129 S.Ct. 2002 (2009).

The plaintiff in this case, Karim Koubriti was tried and convicted on June 3, 2003 of conspiracy to provide material support or resources to terrorists in violation of 18 U.S.C. § § 371 and 2339A. The prosecution of Koubriti and three co-defendants was the government's first terrorism prosecution in the aftermath of the September 11, 2001 terrorist attacks in the United States. The government accused the four men of comprising a "cell" or "sleeper cell" of an Islamic terrorist organization aiming to assist a transnational network of radical Islamists influenced by the Salafiyya religious movement.

On October 12, 2004, the trial court dismissed the terrorism charges against Koubriti, following motions filed by both the government, and Koubriti and his co-defendants, requesting this relief. The government subsequently filed a new indictment against Koubriti, charging him solely with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.

The dismissal of the terrorism charges resulted from the government's conclusion that the Assistant United States Attorney who prosecuted the four defendants, Richard Convertino, had failed to disclose several pieces of material evidence contrary to *Brady v. Maryland,* 377 U.S. 83 (1963). These included documents confirming that the government lacked consensus about the significance of materials found at the defendants' home which the government described as "casing materials". The government also failed to disclose that Convertino had traveled to Jordan with FBI Agent Michael Thomas in late February 2002 to

visit the sites allegedly depicted in a day planner found at the defendants' home, and that he had directed the course of the investigation against the defendants.

One key facet of this nondisclosure concerned the prosecution's theory that the day planner contained sketches of Queen Alia Hospital in Jordan. At trial, it relied on the extensive and detailed testimony of SSA George to establish that the drawings, with the arabic words "American Airbase in Turkey under the Leadership of Defense Minister" and "Queen Alia Jordan" were casing sketches. The government later revealed that it had taken photos of the Queen Alia Hospital which would have rebutted the testimony that the site matched the sketch.

Instead, at trial, SSA Thomas testified that he had brought a camera to Jordan, but unfortunately did not take any pictures of the hospital or a dead tree which was prominently located near the hospital and was allegedly also present in the sketch. SSA Smith testified that he did not believe that he could have obtained photographs and that he "would have to get higher approval as high as the Ambassador" before obtaining photographs. In its brief concurring with Koubriti's request for a new trial, the government acknowledged:

- That Agents Thomas and Smith *had* taken the photographs of the hospital, which did not match with the sketch in the day planner, which they failed to provide to either the court or the defense.

- That agents visiting the hospital were unable to locate the alleged dead tree landmark.

- That there was no government consensus that one of the drawings represented the hospital.

- That there was no government consensus that the other drawing represented a hardened air shelter at Incirlik Air Base in Turkey.

The government also admitted that it had failed to reveal exculpatory evidence concerning the testimony of its star witness, Yousseff Hmimssa, including: 1) a letter from a prison inmate indicating that Hmimssa had bragged to him while they were both incarcerated that he had "fooled" the FBI and the Secret Service; 2) other documentation indicating that, contrary to his testimony, Hmimssa harbored deep-seeded anti-American views; and 3) that Convertino and other officials interviewed Hmimssa more that ten times prior to trial and that Convertino "made a deliberate decision not tho have the FBI take any notes or prepare any memoranda of these sessions in order to limit defense counsel's ability to cross-examine Hmimssa."

In 2007, Koubriti sued Convertino and Thomas, charging that they had violated his Fifth Amendment rights by "knowingly or recklessly fabricating evidence against him, by failing to disclose exculpatory evidence in his favor, and by obfuscating or misrepresenting the facts to the Grand Jury and at his trial."

Convertino and Thomas moved for dismissal of all claims pursuant to F. R. Civ. P. 12(b)(8), arguing that they were entitled to absolute and qualified immunity.

In an opinion and order dated December 3, 2008, the district court issued an Order Denying Defendant's Motion to Dismiss for Failure to State a Claim. The district court held that some of Koubriti's allegations against Convertino fell within the absolute immunity protection: specifically, the allegation that Convrtino failed to turn over government photographs of the Queen Alia Hospital as well as the claim that Convertino failed to disclose the opinions of government agents regarding alleged sketches of Incirlik Air Base. However, the court found that the rest of the allegations contained in Koubriti's complaint referred to activities by Convertino that were investigatory in nature and thus not entitled to absolute immunity, suggesting that Convertino would have only qualified immunity for these claims. The court did not actually analyze the claims under the qualified immunity standard, but ruled that "dismissal at this procedural juncture [would be] premature."

The district court ruled that Koubriti's Fifth Amendment due process claims were cognizable under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) because alternative remedies were insufficient to protect Koubriti's interests and because it did not believe that there were any special factors counseling against recognizing the cause of action in this case. It noted that Convertino "was not pursuing a legitimate interest" when it engineered a prosecution against Koubriti and his co-defendants by shaping the evidence against them to support a conviction. In *Bivens*, the Supreme Court recognized a cause of action against individual federal officers for violations of the Fourth Amendment's protection against unreasonable search and seizures, noting that "no

special factors counsel[ed] hesitation in the absence of affirmative action by Congress" and there was no "explicit congressional declaration that a person injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 396-97.

Convertino appealed the district court's denial of his motion to dismiss to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit held that Convertino's conduct was protected by prosecutorial immunity. It held that Convertino's misconduct was limited to the withholding of exculpatory evidence, which was protected under the doctrine of absolute prosecutorial immunity. It rejected the district court's conclusion that Convertino's conduct had crossed the line from that of a prosecutor into that of an investigator, and in so doing lost the protections of absolute immunity.

The protection afforded to a prosecutor has been addressed at length by the various circuits, and has resulted in a deep division. Most recently, this Court granted certiorari in *Pottawattamie County v. McGhee,* 129 S.Ct. 2002 (2009). The question presented in that case was whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation and then (2) introduced that same testimony against the criminal defendant at trial.

Denying the defendants' motion for summary judgment, the district court in *Pottawattamie County* held that the prosecutors were absolutely immune from liability based upon claims that they had failed to turn over exculpatory evidence. However, it denied immunity to the extent that the plaintiff's claims arose from allegations that defendants had coerced false testimony from witnesses that was later introduced at trial. It held that such allegations were "sufficient to state a substantive due process claim," and that a constitutional right against such conduct by a prosecutor was "clearly established". See *McGhee v. Pottawattamie County,* 475 F. Supp. 2d 862 (S.D. Iowa 2007).

The defendants in *Pottawattamie County* appealed to the Eighth Circuit, arguing that only the use of false testimony, not merely its procurement, could have violated the respondents constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. The Eighth Circuit rejected this argument. It affirmed the district court's analysis, holding that a prosecutor's procurement of false testimony "violates a [criminal defendant's] substantive due process rights." See *McGhee v. Pottawattamie County,* 547 F.3d 922 (8th Cir. 2008).

Relying on a case from the Second Circuit, *Zahrey v. Coffee,* 221 F.3d 342 (2d. Cir. 2000), the Eighth Circuit further held that a prosecutor is not immune for procurement of false evidence "where the prosecutor was accused of *both* fabricating evidence and *then using the fabricated evidence at trial,*" resulting in a post-trial "deprivation of liberty." 221 F.3d at 344, 349 (Emphasis added.) The Court acknowledged that this reasoning was, "in tension, if

not conflict, with," the Seventh Circuit's decision in *Buckley v. Fitzsimmons,* 20 F.3d 789 (7th Cir. 1994) cert. denied 513 U.S. 1085 (1995). There, the Seventh Circuit held that procurement of false testimony by a prosecutor, without more, does not violate any of a criminal defendant's constitutional rights. The Seventh Circuit further held held that the *use* of such testimony in judicial proceedings is shielded by absolute immunity.

The Eighth Circuit in *Pottawattamie County* refused to stay its mandate, and the petitioners petitioned this Court for certiorari. This Court granted certiorari, and was scheduled to hear argument on the issue, when the parties settled just days before the scheduled argument.

The issue presented in *Pottawattamie County,* whether prosecutors were entitled to absolute immunity for procuring false testimony during an investigation and then using that testimony at trial, is the same issue presented to this Court in the instant case.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit in *Pottawattamie County* held that a prosecutor has no immunity from suit where he allegedly procured false testimony during an investigation, then introduced the same testimony at trial, resulting in a post-trial deprivation of liberty. It held that there exists a "substantive due process" right against procurement of false evidence. This holding is in concert with the Second Circuit's holding in *Zahrey v. Coffee* that a prosecutor is not immune for procurement of false evidence "where the prosecutor

was accused of *both* fabricating evidence and *then using the fabricated evidence at trial,*" resulting in a post-trial "deprivation of liberty." 221 F.3d at 344, 349 (Emphasis added.)

However, the Seventh Circuit in *Buckley v. Fitzsimmons* declined to limit a prosecutor's absolute immunity, even to instances where he both fabricated evidence and then used the fabricated evidence at trial.

In the instant case, Koubriti has alleged–and the government has acknowledged–that Convertino traveled to Jordan with Agents Smith and Thomas, where they took photographs that conflicted with testimony later given by Smith and Thomas. Moreover, Smith and Thomas testified that they never took such photographs. Convertino elicited testimony from Smith and Thomas that the government agents in Jordan concurred that the day planner sketches represented Queen Alia Hospital and Incirlik Air Base, when in fact no such consensus existed.

Like *Pottawattamie County*, this case represents a situation in which the prosecutor not only fabricated evidence, he then used the fabricated evidence at trial, which resulted in a post-trial "deprivation of liberty". Review by this Court is warranted to resolve a serious conflict among the Circuits concerning the extent to which a prosecutor should receive immunity from misconduct which occurred while he was acting as an investigator in marshaling false evidence to be used in a prosecution.

I. A Deep Division Exists Among The Circuits On The Issue Of The Extent to Which A Prosecutor Is Afforded Prosecutorial Immunity For His Misconduct During The Investigative And Trial Phase Of A Criminal Prosecution.

In *Buckley v. Fitzsimmons,* 20 F.3d 789 (7th Cir. 1994) cert denied 513 U.S. 1085 (1995), the Seventh Circuit addressed the critical question of whether a prosecutor: (1) may be sued on allegations that he procured false testimony, and then (2) face liability for a wrongful conviction because he introduced that same testimony at trial. In *Buckley,* the plaintiff, Stephen Buckley, alleged that prosecutors had violated his constitutional rights by coercing false statements from third parties through use of reward money, including co-defendant Rolando Cruz, then using this false testimony in Buckley's indictment and trial.

The Seventh Circuit declined to recognize liability for either the procurement of the false testimony or its subsequent use at trial. As to the former, the Court wrote:

> Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in a drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Id. at 795.

The Seventh Circuit reasoned further that if the prosecutor actually *used* such false testimony in judicial proceedings, then absolute immunity would shield him from a damages suit. *Id.*

In *Pottawattamie County,* the Eighth Circuit provided a much different analysis. *First,* it said that a prosecutor's procurement of false testimony, without more, violates a criminal defendant's "substantive due process rights." *Then,* drawing on the Second Circuit's *Zahrey* decision, the Eighth Circuit reasoned that a prosecutor has no immunity where a "deprivation of liberty * * * can be shown to be the result of [the prosecutor's] fabrication of evidence where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial. *Zahrey,* 221 F.3d at 344, 349.

The Eighth Circuit in *Pottawattamie County* let stand the district court's reasoning that "prosecutors should not be immune from § 1983 liability 'for their non-advocacy wrongful conduct if [a former criminal defendant] can prove that indictment and trial would not have occurred in the absence of the product of the wrongful conduct."

The division between the Seventh and Eighth Circuits is echoed by a similar division between the Second and Third Circuits. *Zahrey v. Coffee* involved a prosecutor who allegedly fabricated evidence against a New York City police officer for use in criminal and police disciplinary proceedings. The target of the proceedings, Zaher Zahrey, was indicted and arrested based on the false evidence, but was subsequently acquitted.

The Second Circuit in *Zahrey* held that there existed a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." 221 F.3d at 349. The Second Circuit reasoned that if a prosecutor fabricated evidence during the investigative phase of the proceeding, when he had only qualified immunity, then "it was at least reasonably forseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested." *Id.* at 354.

The Second Circuit began by recognizing the distinction between a prosecutor's investigatory and prosecutorial conduct. It noted that the Supreme Court has upheld such a distinction:

> Coffey has conceded, for purposes of this appeal, that he was acting in an investigating capacity, a capacity that entitles him, at most, only to qualified immunity. The Supreme Court's rationale for according only qualified immunity to prosecutors who act in an investigating capacity is that their conduct in that capacity should be judged in the same manner as other investigating officers. "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Buckley III*, 509 U.S. at 273 (quoting *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973)).

It then noted that, despite being protected by prosecutorial immunity, a prosecutor who knowingly

uses false testimony in a criminal trial has engaged in unconstitutional conduct. Because a person is responsible for the natural consequences of his actions, the Court concluded:

> We think the right at issue in this case should not be defined at such a level of particularity as to be limited to a right not to be deprived of liberty as a result of an investigating prosecutor's fabrication of evidence. The right is appropriately identified as the right not to be deprived of liberty as a result of any government officer's fabrication of evidence. That right was clearly established in 1996, when Coffey's alleged acts occurred, and it was also then well established that for purposes of actions under section 1983 and Bivens, a person is "responsible for the natural consequences of his actions," *Monroe*, 365 U.S. at 187. Since a jury could find that Coffey would foresee that he himself would use the fabricated evidence and that a deprivation of Zahrey's liberty would result, Zahrey's claim survives Coffey's attempt to have the claim dismissed, as a matter of law, because of a qualified immunity defense. *Zahrey v. Coffey*, 221 F.3d at 354-55.

The Third Circuit, in *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), reached an opposite conclusion. There, a criminal defendant alleged that her constitutional rights were violated when a prosecutor and other investigators employed coercive techniques against witnesses, then used the evidence to obtain her indictment and conviction, which was later reversed. Relying on *Buckley*, the Third Circuit held that the techniques used to interview the

witnesses "did not violate [the plaintiff's] constitutional rights" and that the prosecutor "was entitled to absolute immunity in offering the unreliable evidence." *Id.* at 122.

In the instant case, the Sixth Circuit purported to rule against Koubriti on other grounds, holding that Koubriti's claims against Convertino amounted to no more than "an attempt to seek damages for a traditional *Brady* violation, i.e. failing to disclose the contents of the various interviews in question." However, as discussed at greater length in the following section, Convertino's misconduct fell clearly into the role of an investigator and included the manufacture of false evidence and the presentation of that evidence at trial. Thus, it falls squarely within the *Buckley / Zahrey / Pottawattamie / Michaels* line of cases which is the subject of division among the Circuits.

II. The Sixth Circuit Failed To Recognize Convertino's Misconduct As It Pertained To The Manufacture Of False Testimony And The Subsequent Introduction Of Such Testimony At Trial.

In reversing the district court's holding that Koubriti had stated a claim for a violation of his § 1983 rights, the Sixth Circuit held:

> In the relevant portion of Koubriti's complaint, Koubriti alleges that he is entitled to *Bivens* relief because "Defendant Convertino...withheld exculpatory evidence...by:...B. Failing to disclose that [Convertino, Thomas, and Smith] could not establish which site or sites the sketches

> established (if either) after their respective trips to Jordan." As stated, this is nothing more than an accusation that Convertino failed to disclose exculpatory evidence. As such, the claim fits squarely in the framework set out by *Imbler* and *Jones* and is thus covered by absolute immunity.

Later in its opinion, the Sixth Circuit stated again: "There is no claim here of evidence fabrication, and it is not the evidence that resulted from the trip of which Koubriti complains."

This is a mischaracterization of Koubriti's claims against Convertino. It is true that Convertino failed to disclose a plethora of evidence that undermined nearly all of the government's alleged evidence that Koubriti was guilty of terrorism, including direct evidence that severely undermined the testimony of the government's star witness, Youssef Hmimmsa.

Moreover, Koubriti alleged, and the government acknowledged, that Convertino contravened government procedure by ordering the FBI not to take any notes of their interviews with Hmimmsa in order to limit defense counsel's ability to cross-examine him. It is therefore also likely that no one will ever know the extent to which Convertino and/or other government agents shaped or corrupted Hmimmsa's testimony.

But Koubriti alleged that Convertino's misconduct went beyond a mere failure to disclose exculpatory evidence. In his brief to the Sixth Circuit, Koubriti alleged that Convertino secretly traveled to Jordan with Agents Thomas and Smith, a fact that he did not

reveal to the court or the defense. While there, the agents took photos of Queen Alia Hospital in Jordan, and found that these photographs rebutted their theory that the photos would match the sketch found in the day planner. However, Agents Thomas and Smith testified that they had *not* taken any photos of the hospital, because they had not obtained approval to do so. Agents Thomas and Smith also testified that there was consensus among government agents that one of the drawings in the day planner depicted the hospital, and one depicted Incirlik Air Base in Turkey, when in fact there was no such consensus. Finally, they testified that there was consensus that the videotape found at the defendants' home constituted terrorist "casing materials", when in fact, there was no such consensus.

Convertino's misconduct went far beyond that of a prosecutor who fails to disclose evidence that might damage his case. Here, he acted as an investigator when he traveled to Jordan to gather evidence in support of the prosecution. However, in this role he acted improperly, and unconstitutionally, by gathering only evidence that supported his case, and suppressing and withholding evidence that conflicted with his theory. He did not simply gather evidence and allow the evidence to speak for itself and guide his theory of the case. He developed a theory and selectively gathered and manufactured evidence that fit within this theory, while purposefully suppressing and hiding the evidence that suggested that his theory was wrong.

Then, *after* perverting the evidence against Koubriti and his codefendants in this manner, he knowingly elicited the false testimony from Smith and Thomas that no photos of the hospital had been taken,

and that there was consensus concerning what was represented in the day planner sketches and other alleged "casing materials".

To pretend as if Convertino acted as an ordinary prosecutor in this case is to ignore his extraordinary level of involvement in the case from its inception. This is not a case in which agents investigated claims against the defendants, gathered evidence, and then handed the case off to Convertino where he could make a decision as to what the evidence established and how it should be presented at trial. In such a situation, even if Convertino had deliberately elicited false testimony from Smith and Thomas at trial, or withheld exculpatory evidence, his misconduct would be protected under the doctrine of prosecutorial immunity.

However, that is not what occurred here. Convertino surreptitiously traveled to a foreign country, collected evidence, directed witness interviews, and molded all of what he gathered to fit within his theory that Koubriti and his co-defendants comprised a terrorist "sleeper cell". *Only then* did he put on his prosecutor's hat, and engage in the prosecutorial misconduct of failing to disclose exculpatory evidence and knowingly eliciting false testimony from his witnesses.

Like the defendants in *Zahrey* and *Pottawattamie County,* Convertino's misconduct consisted to two distinct acts: 1) Fabricating evidence and 2) Using the fabricated evidence at trial. As noted in previous sections of this petition, a deep division exists within the Circuits as to whether such misconduct by a prosecutor should be protected by the doctrine of

prosecutorial immunity. Review by this Court is warranted to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2010

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, Filed February 3, 2010 ..... 1a

Appendix B: Order Denying Defendant's Motion To Dismiss For Failure To State A Claim, United States District Court Eastern District of Michigan Southern Division, filed December 3, 2008 ..... 27a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-1016

[Filed February 3, 2010]

KARIM KOUBRITI, *Plaintiff-Appellee,*

v.

RICHARD CONVERTINO, *Defendant-Appellant,*

MICHAEL THOMAS, *Defendant.*

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 07-13678—Marianne O. Battani, District Judge.

Argued: October 14, 2009

Decided and Filed: February 3, 2010

Before: KENNEDY and ROGERS, Circuit Judges; HOOD, District Judge.*

COUNSEL

ARGUED: Robert S. Mullen, ROBERT S. MULLEN AND ASSOCIATES, PLLC, Plymouth, Michigan, for Appellant. Ben M. Gonek, LAW OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Robert S. Mullen, ROBERT MULLEN AND ASSOCIATES, PLLC, Plymouth, Michigan, for Appellant. Ben M. Gonek, LAW OFFICE, Detroit, Michigan, for Appellee.

OPINION

KENNEDY, Circuit Judge. Defendant-Appellant Richard Convertino appeals the district court's partial denial of his motion to dismiss for failure to state a claim in this civil action filed against him by Plaintiff-Appellee Karim Koubriti. Koubriti seeks monetary damages from Convertino, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for constitutional violations that Convertino allegedly committed while serving as the Assistant United States Attorney who prosecuted Koubriti for conspiracy to provide material support or resources to terrorists in violation of 18 U.S.C. §§ 371 and 2339A, and conspiracy to engage in fraud or misuse of visas, permits, or other immigration documents in violation of 18 U.S.C. §§ 371 and 1546(a).

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Because 1) Plaintiff has pointed to no harm to himself from the investigation Convertino conducted except the non-disclosure of certain exculpatory evidence at trial, and 2) Convertino is shielded by prosecutorial immunity for such nondisclosures of exculpatory evidence, we REVERSE the decision of the district court denying in part Convertino's motion to dismiss and AFFIRM its decision to the extent that it granted Convertino's motion in part.

FACTUAL AND PROCEDURAL BACKGROUND

On September 17, 2001, in response to the September 11, 2001, terrorist attacks, a team of federal agents went to a house at 2653 Norman Street in Detroit in an attempt to interview one Nabil Al-Marabh, an individual on the FBI's "watch list" of suspected terrorists.[1] Upon entering the house, the agents found Plaintiff Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud. A subsequent

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[1] These facts, as well as the vast majority of other facts stated in this opinion, come from an exhibit that was attached to Koubriti's First Amended Complaint. The exhibit–titled "Government's Consolidated Response Concurring in the Defendants' Motions for a New Trial and Government's Motion to Dismiss Count One Without Prejudice and Memorandum of Law in Support Thereof"–was originally filed by the government in response to the motion for a new trial that Koubriti filed in his underlying criminal case, *United States v. Koubriti*, Case No. 01-80778 (E.D. Mich.). The district court relied on this document for its version of the facts, and both parties rely heavily on it for presentation of the facts of the case to this Court. "[D]ocuments attached to the pleadings become part of the pleadings and may be considered on a motion to dismiss." *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 335 (6th Cir. 2007) (citing Fed. R. Civ. P. 10(c)).

search of the house turned up false identity documents for each occupant, as well as "over 100 audio tapes featuring fundamentalist Islamic teachings, a videotape depicting a number of American tourist landmarks, and a day planner bearing suspicious drawings labeled 'The American Base in Turkey under the Leadership of Defense Minister,' and 'Queen Alia, Jordan.'"[2] *United States v. Koubriti*, 199 F. Supp. 2d 656, 659 (E.D. Mich. 2002). All three men were arrested, and each was charged the next day with possession of false identification and/or immigration documents in violation of 18 U.S.C. §§ 1028(a)(4), 1546, and 371.[3] Responsibility for prosecution of the case was assigned to Defendant Richard Convertino, then an Assistant United States Attorney for the Eastern District of Michigan. Convertino, along with FBI Agent Michael Thomas and others, began investigating the men for any ties to terrorist organizations or activities. Convertino eventually developed a theory that the men–along with Abdel Ilah El Mardoudi–were a "cell" or "sleeper cell" of an Islamic terrorist organization aiming to assist a transnational network of radical Islamists influenced

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[2] The government would later allege that these two sketches, respectively, were of a hardened air shelter at the United States Air Base in Incirlik, Turkey, and of the U.S.-operated Queen Alia military hospital in Amman, Jordan.

[3] On September 27, 2001, an indictment returned on the same charges. Youseff Hmimssa, a former housemate of the men, was also named as a codefendant in this indictment. However, the charges against him were later severed because of his agreement to cooperate with the government and testify against his fellow defendants. *See United States v. Koubriti*, 307 F. Supp. 2d 891, 894 n.1 (E.D. Mich. 2004). This occurred sometime in March 2002, prior to the Second Superseding Indictment.

by the Salafiyya religious movement. Based on his theory, Convertino caused the filing of a second[4] and then third[5] superseding indictment against Koubriti and the others which added to the existing charges a count of conspiracy to provide material support or resources to terrorists in violation of 18 U.S.C. §§ 371 and 2339A.

At Koubriti's criminal trial, the government relied on three different types of evidence to establish its terrorism case: 1) expert testimony that the day planner sketches and videotape seized from the Norman house constituted terrorist "casing"[6] material; 2) the testimony of Koubriti's former housemate, Youseff Hmimssa, that the defendants indeed had terrorist leanings and intentions; and 3) corroborating evidence that the defendants had committed acts consistent with terrorist activities, such as committing document and credit fraud, attempting to obtain commercial truck licenses for transporting hazardous materials, possessing audio tapes of fundamentalist speakers, and making international wire transfers. On June 3, 2003, after a trial spanning three months, a jury convicted Koubriti of Count I (conspiracy to provide material support or resources to terrorists)

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[4] Abdella Lnu and Youseff Hmimssa were also named in this indictment.

[5] El Mardoudi was also added as a codefendant in this indictment.

[6] Both Koubriti and Convertino (as well as the government in the Koubriti's criminal case) use this term in their briefs to describe this evidence. The parties appear to use this term to suggest that the material was specifically being used to help the defendants develop and plan their intended attacks.

and Count II (conspiracy to engage in fraud and misuse of visas, permits, and other documents).[7]

On October 15, 2003, Koubriti and the other defendants filed a Motion for New Trial on the grounds that the government suppressed material evidence contrary to *Brady v. Maryland*, 373 U.S. 83 (1963). Motion for New Trial, *United States v. Koubriti*, Case No. 01-80778 (E.D. Mich. Oct. 15, 2003). On December 12, 2003, the trial court held a hearing regarding the claim and found that two previously undisclosed documents in the possession of the government constituted material evidence that should have been disclosed to the defense. Accordingly, the court ordered the government to conduct a full and independent review of its case files to determine if there were other documents that should have been disclosed pursuant either to *Brady* or *Giglio v. United States*, 405 U.S. 150 (1972). On June 29 and August 30, 2004, the government disclosed numerous additional documents that had not previously been submitted or shown to Koubriti and the other defendants.

On August 31, 2004, the government filed a further response to Koubriti's motion which concurred in the request for a new trial and asked the court to dismiss the terrorism count without prejudice. In its brief to the court, the government provided a detailed description of several instances where it had failed to disclose relevant, exculpatory, or otherwise discoverable material. With respect to the alleged

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[7] El Mardoudi was also convicted of both counts. Hannan was convicted of document fraud, but not of the terrorism charge. Ali-Haimoud was acquitted of all charges.

casing materials, the government acknowledged several material non-disclosures, including: 1) photographs of the Queen Alia hospital that had been taken by a government agent investigating in Jordan; 2) statements disclosing that there was not a consensus among government officials that any of the sketches represented the hospital; 3) that some government experts believed that the videotape was not casing material; 4) that there was no consensus that any of the sketches represented a hardened air shelter at the Incirlik Air Base; and 5) that some agents actually believed that the drawings merely represented a map of the Middle East. The government also acknowledged that Convertino had traveled to Jordan with Agent Thomas in late Febraury 2002 to visit the sites allegedly depicted by the day planner sketches. With respect to Yousseff Hmimssa's testimony, the government again acknowledged several material non-disclosures, including: 1) a letter from a prison inmate indicating that Hmimssa had bragged to him while they were both incarcerated that he had fooled the FBI and the Secret Service; 2) other documentation indicating that, contrary to his testimony, Hmimssa harbored deep-seated anti-American views; and 3) that Convertino and other officials interviewed Hmimssa more than ten times prior to trial and that Convertino "made a deliberate decision not to have the FBI take any notes or prepare any memoranda of these sessions in order to limit defense counsel's ability to cross-examine Hmimssa." Finally, with regard to the government's corroborating evidence, the government again acknowledged that it had failed to disclose certain material evidence.

The trial court in Koubriti's criminal trial dismissed the defendants' terrorism charge without prejudice and granted a new trial as to the fraud count. *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004). Koubriti was released on bond on October 12, 2004 and is now under the supervision of Pretrial Services. The government has since filed a new indictment against Koubriti, charging him solely with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.

Following the dismissal, Convertino was indicted on charges of conspiracy to obstruct justice and make false declarations in violation of 18 U.S.C. § 371, obstruction of justice in violation of 18 U.S.C. §§ 2 and 1503, making a materially false declaration before a court in violation of 18 U.S.C. §§ 2 and 1623, and obstruction of justice in violation of 18 U.S.C. § 1503 based on his conduct at the trial. On October 31, 2007, Convertino was acquitted of all counts. The Michigan Attorney Grievance Commission also investigated Convertino's actions relating to the Koubriti case, but it did not bring any disciplinary charges.

On August 30, 2007, Koubriti filed the present action. In his complaint–which named Convertino, Thomas, and Ray Smith[8] as co-defendants–Koubriti seeks relief pursuant to the Fifth Amendment and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Koubriti requested $9,000,000 in compensatory damages plus punitive damages arguing that:

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[8] Smith was a State Department officer stationed in Jordan who was present during Thomas and Convertino's trip to Jordan.

> Defendants violated his Fifth Amendment Rights by maliciously and intentionally withholding exculpatory evidence and fabricating evidence contrary to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), prior to and during his prosecution for the offense of conspiracy to provide materials for or resources to terrorists contrary to 18 U.S.C. §§ 371 and 2339(e).

The complaint then sets out the following claims with respect to Convertino's liability:

> Defendant Convertino while acting in an investigative type role withheld exculpatory evidence or fabricated evidence in the Plaintiff's criminal case by:
>
> > A. Failing to turn over photographs of the Queen Alia Hospital or ordering that they not be turned over to the Defendant or presented to the Grand Jury;
> > B. Failing to disclose that none of the Defendants could not [sic] establish which site or sites the sketches established (if either) after their respective trips to Jordan;[9]
> > C. Ordering or directing Defendant Thomas not to memorialize any of the ten to twenty interviews of Yousif Hnimssa

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[9] Because this statement is somewhat unclear, it bears noting that there was only one trip to Jordan, which Thomas and Convertino made together. Ray Smith was also present during the trip because he was stationed in Jordan as an officer for the State Department.

> [sic] prior to the Second Superseding Indictment being issued; and
> D. Failing to disclose the Opinion of Air Force OSI SA Goodnight to the Grand Jury or Plaintiff concerning the alleged Incirlik Air Base sketches.

On May 9, 2008, Convertino filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted. In his brief supporting the motion, Convertino argued that alternative forms of relief and other special factors counseled against recognizing a *Bivens* remedy at all, and in the alternative, that as prosecutor he was entitled to absolute immunity from the claims.

On December 3, 2008, the district court denied Convertino's motion to dismiss the case. Addressing the immunity issue first, the court found that several of the allegations did in fact fall within the absolute immunity doctrine: specifically, the claim that Convertino failed to turn over government photographs of the Queen Alia Hospital as well as the claim that Convertino failed to disclose the opinions of government agents regarding the alleged Incirlik Air Base sketches. The court found that the rest of the allegations of the First Amended Complaint referred to actions by Convertino that were investigatory in nature and thus not entitled to absolute immunity. The court suggested that Convertino would only have qualified immunity for these claims. It did not analyze the claims under the qualified immunity standard, however. Rather, it ruled that "dismissal at this procedural juncture [would be] premature." Finally, the court ruled that Koubriti's Fifth Amendment Due Process claims were cognizable as the basis for a

Bivens action because alternative remedies were insufficient to protect Koubriti's interests and because it did not believe there were any special factors counseling against recognizing the cause of action in this case.

Accordingly, the court denied Convertino's motion to dismiss. This appeal followed. Koubriti has not cross-appealed the district court's ruling that the allegations other than ¶¶ 27 B and C were barred by absolute immunity. Consequently, the only questions we have before us are whether the remaining allegations are barred by absolute prosecutorial immunity or qualified immunity and, if not, whether a *Bivens* remedy should even be recognized for these alleged constitutional violations.

JURISDICTION/STANDARD OF REVIEW

This case comes to us on a denial of a motion to dismiss, a posture which is not normally appealable to this Court. "A district court's denial of a claim of qualified immunity, [however,] to the extent that it turns on an issue of law is an appealable final decision within the meaning of 28 U.S.C. § 1291, notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *see also Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008) (quoting *Mitchell*, 472 U.S. at 530). Furthermore, as the Seventh Circuit has noted:

> The Supreme Court recently clarified that the scope of [the collateral order] doctrine includes jurisdiction over whether 'to devise a new *Bivens* damages action' and explained:

> We recognized just last Term that the definition of an element of the asserted cause of action was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." *Hartman v. Moore*, 547 U.S. 250, 257 n.5 . . . (2006). Because the same reasoning applied to the recognition of the entire cause of action, the Court of Appeals had jurisdiction of this issue, as do we.

Carvajal, 542 F.3d at 566 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007)); *see also Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009) (finding jurisdiction to review denial of summary judgment in case asserting a § 1983 claim against state police officers because qualified immunity was at stake). Thus, we have jurisdiction over the questions presented by Convertino in this appeal, and we will review the district court's decisions *de novo*. *See Moldowan*, 578 F.3d at 374 ("Whether a defendant is entitled to absolute or qualified immunity from liability . . . is a legal question that this Court reviews *de novo*.").

ANALYSIS

I.

Koubriti's first allegation not dismissed by the district court is that he is entitled to civil damages under *Bivens* on the ground that Convertino "failed to disclose, during Koubiriti's criminal trial, the fact that the government could not establish which site or sites the day planner sketches represented (if either) during

their trips to Jordan." In response, Convertino argues that he is entitled to absolute immunity that bars him from any potential civil liability related to this failure. We find that Convertino has the better argument.

Under the *Bivens* line of cases, the Supreme Court has recognized a cause of action against federal officials for certain constitutional violations when there are no alternative processes to protect the interests of the plaintiff and no special factors counseling against recognizing the cause of action. *Wilkie*, 551 U.S. at 550. On the other hand, government officials generally enjoy a presumption of qualified immunity from civil lawsuits, such that they are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted). Furthermore, officials enjoy absolute immunity from civil liability related to their performance of "prosecutorial" functions. *See Burns v. Reed*, 500 U.S. 478, 486 (1991). The burden of proof is on the official seeking absolute immunity, however, to prove that the behavior in question falls in the category of behavior that merits this higher level of protection. *Id.*

In *Burns v. Reed*, the Supreme Court mandated that courts use a "functional approach" when determining whether a government official's actions fit within the category of actions traditionally entitled to absolute immunity. *Id.* Using this approach, courts must look to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v.*

White, 484 U.S. 219, 229 (1988). Functions that serve as an "integral part of the judicial process" or that are "intimately associated with the judicial process" are absolutely immune from civil suits. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Meanwhile, functions which are more "investigative" or "administrative" in nature, because they are more removed from the judicial process, are subject only to qualified immunity. *Burns*, 500 U.S. at 486. Although "[t]he line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw," *Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000), we are not without some guidance to help determine where that line should be drawn. For example, conduct by a prosecutor that is nonetheless investigative or administrative in function includes: "giving legal advice to police," *Spurlock v. Thompson*, 330 F.3d 791, 798 (6th Cir. 2003); making "out-of-court statements" at a press conference, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277-78 (1993); making statements "in an affidavit supporting an application for an arrest warrant," *Fletcher v. Kalina*, 522 U.S. 118, 139 (1977); and "authorizing warrantless wiretaps in the interest of national security," *Mitchell*, 472 U.S. at 520. On the other hand, prosecutors have absolute immunity from "suits for malicious prosecution and for defamation, and . . . this immunity extend[s] to the knowing use of false testimony before the grand jury and at trial." *Burns*, 500 U.S. at 484. Likewise, they have absolute immunity for the following actions: appearances at probable cause and grand jury hearings, *Spurlock*, 330 F.3d at 797; evaluation of evidence and presentation of that evidence at pre-trial and trial proceedings, *id.*; and preparation of witnesses for trial, *id.*

Finally, and most importantly to our review here, prosecutors have absolute immunity from civil liability for the non-disclosure of exculpatory information at trial. *Imbler*, 424 U.S. at 431 n.34. In *Imbler*, the Supreme Court equated the non-disclosure of exculpatory information with the use of perjured testimony and ruled that evidence suppression should be equally protected by absolute immunity. *Id.* Even though such behavior is "reprehensible, warranting criminal prosecution as well as disbarment," the Court found that allowing civil actions for such allegations would "weaken the adversary system at the same time it interfered seriously with the legitimate exercise of prosecutorial discretion." *Id.* This Court's decision in *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986), is also helpful to our review. In *Jones*, the plaintiff brought a § 1983 action[10] against multiple county officials for numerous alleged violations relating to the plaintiff's trial and conviction for second-degree murder–a conviction which was later overturned on federal habeas review when it was determined that the prosecution had refused to disclose an eyewitness statement that made no mention of the plaintiff being involved in the shooting. In his civil complaint, the plaintiff there alleged that three county prosecutors were liable for failing to disclose exculpatory information, including, but not limited to, the aforementioned witness statement. Based on these allegations, this Court had no problem finding "that the individual county prosecutors were absolutely immune from personal liability in damage suits . . . ."

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[10] The Supreme Court has ruled that "the qualified immunity analysis is identical" under § 1983 causes of action and *Bivens* causes of action. *Wilson*, 526 U.S. at 609.

Id. According to the panel, the plaintiff's claims were "*clearly* within the scope of immunity contemplated by the Supreme Court in *Imbler*." *Id.* (emphasis added). "The . . . non-disclosure of exculpatory information [is] certainly entitled to absolute immunity." *Id.*

We fail to see how *Imbler* and *Jones* are distinguishable in any functional way from Koubriti's claim in the instant case that Convertino failed to disclose the lack of consensus among government officials as to what the sketches depicted. In the relevant portion of Koubriti's complaint, Koubriti alleges that he is entitled to *Bivens* relief because "Defendant Convertino . . . withheld exculpatory evidence . . . by: . . . B. Failing to disclose that [Convertino, Thomas, and Smith] could not establish which site or sites the sketches established (if either) after their respective trips to Jordan." As stated, this is nothing more than an accusation that Convertino failed to disclose exculpatory evidence. As such, the claim fits squarely in the framework set out by *Imbler* and *Jones* and is thus covered by absolute immunity.

Koubriti attempts to distinguish his claim by focusing on the circumstances surrounding the *acquisition* of the alleged exculpatory information produced by Convertino's investigation instead of the actual non-disclosure of the information. In his brief to this court, Koubriti highlights the fact that Convertino traveled to Jordan some fifteen months before the trial began and investigated the buildings allegedly depicted in the day planner sketches. The district court, in agreeing with Koubriti, stated that "immunity cannot extend to actions by a prosecutor that violate a person's substantive due process rights by obtaining, manufacturing, coercing or fabricating

evidence before filing formal charges, even if the subsequent use of that evidence is protected by absolute immunity." The argument made by Koubriti and the district court fails to recognize that Koubriti is not requesting relief for some alleged violation that took place during Convertino's trip to Jordan. There is nothing in the complaint to suggest that Koubriti is arguing that he is entitled to relief here because of some due process violation Convertino committed while he investigated the case in Jordan.[11] That would be a different claim, one that would no doubt *not* need to rely on *Brady*. Instead, what we have in the instant case is an allegation that relies on *Brady*–a case dealing with the non-disclosure at trial of exculpatory information–and is based on the non-disclosure of a pertinent fact, not the underlying investigation itself. There is no claim here of evidence fabrication, and it is not the evidence that resulted from the trip of which Koubriti complains. Indeed, it was that evidence which, when finally disclosed, *benefitted* Koubriti in obtaining dismissal of his conviction. It was the failure to produce this favorable evidence resulting from the trip so that Koubriti could have relied on it at trial to undermine the government's claim that is the alleged violation underlying this claim.

The very same policy reasons undergirding the Supreme Court's decision in *Imbler* also counsel in favor of recognizing absolute immunity here. Since prosecutors are almost always involved with the

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[11] The district court refers to a general due process violation but never specifically explains or even identifies what that violation was. Plaintiff's complaint does not allege a due process violation aside from the *Brady* violations.

police's investigation of crimes, denying absolute immunity in cases such as this would likely "eviscerate" the absolute immunity in traditional non-disclosure claims that the Supreme Court has already decided to protect. *Imbler*, 424 U.S. at 431 n.34. Likewise, it would "weaken the adversarial system" and interfere with prosecutorial discretion much in the same way that caused the *Imbler* Court to rule in favor of granting immunity. *See id.* Since Plaintiff's claim (and underlying harm) is only related to the non-disclosure and not the underlying investigation, the *Imbler* and *Jones* dispositions lead us to the conclusion that Convertino has absolute immunity from this claim.

II.

The district court also allowed Koubriti to proceed on his *Bivens* claim relating to the allegation that Convertino directed FBI Agent Thomas not to memorialize interviews by Convertino and Thomas of Youssef Himimssa leading up to trial. Convertino again argues that he is entitled to absolute immunity from this claim, while Koubriti argues that Convertino's relevant behavior was investigative in nature and thus not entitled to absolute immunity.

In denying the government's motion as to this claim, the district court stated that "[t]he instruction by Convertino not to record witness interviews,[12] falls

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[12] The district court uses the term "record witness interviews" here notwithstanding the fact that Koubriti, in his complaint, characterizes the allegation as a failure to "memorialize" the interviews. To the extent that there is a different between the failure to record the interviews and the failure to memorialize

outside the bounds of trial preparation." In reaching this conclusion, the district court cited to district court and court of appeals decisions from outside this Circuit for the general proposition that prosecutors are only entitled to qualified immunity when providing legal advice to police and other government agents. It thus appears that the district court considered Koubriti's claim as one alleging a general due process violation independent of *Brady* and its progeny. We view the claim differently. Looking to Koubriti's First Amended Complaint filed in the district court, Koubriti specifically alleges the following: "Defendant Convertino while acting in an investigative type role withheld exculpatory evidence or fabricated evidence in the Plaintiff's criminal case by: . . . C. Ordering Defendant Thomas not to memorialize any of the ten to twenty interviews of Yousif Hnimssa [sic] prior to the Second Superseding Indictment being issued . . . ." Koubriti also lays out the basis of his claims on page 3 of the complaint:

> Specifically, Plaintiff is claiming that the named Defendants violated his Fifth Amendment Rights by maliciously and intentionally withholding exculpatory evidence and fabricating evidence[13] contrary to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), prior to and

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them, Plaintiff has only alleged the failure to memorialize the interviews. Our analysis relies on that assumption.

[13] Although Plaintiff makes this statement in ¶ 9 of the complaint, he does not identify the "fabricated evidence" alleged there or elsewhere. With respect to the interviews of Hmimssa, there is only the claim of preventing the creation of evidence for probable impeachment of that witness.

> during his prosecution for the offense of conspiracy to provide materials for or resources to terrorists contrary to 18 USC 371 and 2339(c).

Viewing these statements together, it seems clear that Koubriti is actually alleging a simple *Brady*-related violation in the form of non-disclosure of the statements Hmimssa made to federal officials in his multiple interviews.[14] Koubriti has not asked this Court to recognize Convertino's actions here as a freestanding due process violation independent of *Brady*. Instead, he consistently relies on *Brady* to support his claim, a case which addresses the non-disclosure of exculpatory evidence from the defense *at trial*. *Brady* does not provide guidance as to the constitutional limits of a prosecutor's behavior during the investigation of a crime. Therefore, it seems clear to this Court that Koubriti's claim here amounts to an attempt to seek damages for a traditional *Brady* violation, i.e. failing to disclose the contents of the various interviews in question.

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[14] Not surprisingly, Koubriti has also made attempts to characterize the claim as something other than a traditional *Brady* violation. In so doing, he was able to make Convertino's underlying behavior seem more investigative in nature, which would allow him to avoid the absolute immunity hurdle. Koubriti cannot, however, have it both ways. Either he must state a *Brady* violation as the basis for this part of his *Bivens* action–which must rely on some sort of non-disclosure of evidence by the prosecutor–or he must state a freestanding Fifth Amendment due process violation independent of *Brady* and its progeny–which could then rely on the prosecutor's directive to the agents not to memorialize the interviews. These are two distinct claims which require different substantive and legal analysis.

When Koubriti's claim is characterized as a traditional *Brady* violation, it becomes clear that Convertino is entitled to absolute immunity from civil liability relating to this claim as well. In fact, the immunity analysis is no different than it was for the previous claim. Just as we stated above, *Jones* and *Imbler* make clear that absolute immunity protects a prosecutor from civil liability for the non-disclosure of material exculpatory evidence at trial. *See Imbler*, 424 U.S. at 431 n.34; *Jones*, 800 F.2d at 80. Therefore, absolute immunity also shields Convertino from this claim.

Even if we were to somehow recognize this claim as one of something other than a mere *Brady* non-disclosure allegation, we would still find that Convertino has immunity sufficient to bar this action from proceeding. Assuming *arguendo* that Convertino's relevant behavior (i.e. his direction to federal agents, rather than his non-disclosure at trial) is "administrative" conduct covered only by qualified immunity,[15] that immunity still completely shields

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[15] Although we assume this conduct is "investigative" here for the purposes of this analysis, we do not endorse that assumption. Any attempt by Koubriti to characterize Convertino's directives as "administrative" or "investigative" is no different than the argument rejected by the Supreme Court in *Imbler*. In that case, the relevant conduct was the prosecutor's request to police not to question a testifying witness about an unrelated charge until after that witness completed his testimony at trial. *Imbler*, 424 U.S. at 431 n.32. In rejecting the petitioner's contention that that conduct was "investigative," the Court stated: "Seen in its proper light, . . . [the prosecutor's] request of the officers was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate." *Id.* This same logic arguably applies to the case now before us. Convertino's directive was part of his

Convertino from liability unless 1) he committed a constitutional violation, and 2) the right that was violated was a clearly established right of which a reasonable person would have known. *Harlow*, 457 U.S. at 818. Whether Koubriti's allegation, when characterized as a more general due process claim, amounts to a constitutional violation has not been developed in the lower court record, nor has it been briefed to this Court. Therefore, it would be improper to reach the merits of this question. *See, e.g.*, *Citizens Coal Council v. EPA*, 447 F.3d 879, 905 (6th Cir. 2006) (en banc) ("In short, the panel majority erred in ruling on grounds not raised by the parties. Because it was improper for the panel majority to reach issues not briefed by the parties, . . . we decline to reach those issues here."). Since the Supreme Court's decision in *Pearson v. Callahan*, however, we are no longer required to address the constitutionality of the alleged conduct first and can resolve the issue by determining whether such a violation was clearly established. 129 S. Ct. 808, 818 (2009).

In the instant case, even if the claim were to be characterized as one alleging that Convertino violated Koubriti's right to due process by ordering agents not to memorialize the Hmimssa interviews, we could not say that it was clearly established that such behavior is unconstitutional. "In determining whether a right is clearly established, we 'may rely on decisions of the Supreme Court, decisions of this court and courts

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effort to prepare for trial and to control how his witness' testimony would play out at the trial. *See id.* As alleged, this conduct is questionable. Nevertheless, a prosecutor's conduct in his role as an advocate is protected by absolute immunity, *see Buckley*, 509 U.S. at 273, even when that conduct is improper.

within this circuit, and in limited circumstances, on decisions of other circuits.'" *Moldowan*, 578 F.3d at 381-82 (quoting *Spurlock*, 167 F.3d at 1006). When evaluating whether the specific right has been recognized, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "In other words, 'the unlawfulness must be apparent.'" *Moldowan*, 578 F.3d at 382 (quoting *Anderson*, 483 U.S. at 640).

Here, we can find no case law to support the conclusion that a reasonable official would have understood that the complained of action violated Koubriti's rights. Although Convertino's directive may be questioned, it cannot be said that its unlawfulness is apparent, particularly when reviewing the existing case law. While such behavior is in tension with the policy judgments underlying *Brady*,[16] it would indeed go well beyond the reasonable limits of the *Brady* non-disclosure doctrine to say that it also requires memorialization of interviews. Additionally, cases analyzing sets of facts more similar to the instant case than those in *Brady* have suggested that it is not a constitutional violation. *See Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional

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[16] In *Brady*, the Supreme Court stated: "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence . . . of an accused which . . . would tend to exculpate him . . . does not comport with the standards of justice." *Brady*, 373 U.S. at 87.

requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); *United States v. Bernard*, 625 F.2d 854, 860 (9th Cir. 1980) ("Nor can we find a constitutional basis for compelling the creation of [written witness statements] under *Brady*.") Thus, Convertino's behavior, were it to be ruled as a constitutional violation, was not clearly established as a violation at the time Convertino acted. Convertino's qualified immunity, then, would still be sufficient to shield Convertino from this claim, even when characterized in the way the district court and Koubriti suggest.

III.

After it decided not to dismiss Koubriti's action on prosecutorial immunity grounds, the district court found that a *Bivens* action for money damages is "cognizable for a violation of an individual's Fifth Amendment due process rights." Because we rule today that the case must be dismissed because Convertino is shielded from these claims by prosecutorial immunity, we need not address the court's ruling on the applicability of *Bivens* relief to this context.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's decision to the extent it denied in part defendant Convertino's motion to dismiss and AFFIRM its decision to the extent it granted the motion to dismiss. The action is REMANDED for entry of a judgment of dismissal with respect to defendant Convertino.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1016

[Filed February 3, 2010]

KARIM KOUBRITI,	)
Plaintiff - Appellee,	)
	)
v.	)
	)
RICHARD CONVERTINO,	)
Defendant - Appellant,	)
MICHAEL THOMAS,	)
Defendant.	)
	)

Before: KENNEDY and ROGERS, Circuit Judges; HOOD, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED to the extent it denied defendant Richard Convertino's motion to dismiss and is AFFIRMED to the extent it granted the motion to dismiss. The action is REMANDED for entry of a judgment of dismissal with respect to defendant Convertino.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 07-13678
HON. MARIANNE O. BATTANI

[Filed December 3, 2008]

KARIM KOUBRITI,	)
	)
Plaintiff,	)
	)
v.	)
	)
RICHARD CONVERTINO and MICHAEL THOMAS, Jointly and Severally and in their Individual Capacities,	)
	)
Defendants.	)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Before the Court is Defendant Richard Convertino's Motion to Dismiss Pursuant to F. R. CIV. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can be Granted (Doc. No. 47). The Court heard oral argument and, at the conclusion of the hearing, took this matter

under advisement. For the reasons that follow, the Court **DENIES** the motion.

I. PROCEDURAL BACKDROP

Plaintiff, Karim Koubriti filed his First Amended Complaint against Defendants Richard Convertino and Michael Thomas, a Special Agent with the Federal Bureau of Investigation, asserting Defendants violated the Fifth Amendment. Plaintiff's claims arise out of Defendants' alleged misconduct in the criminal prosecution of Plaintiff for Conspiracy to Provide Material Support or Resources to Terrorists in violation of 18 U.S.C. §§ 371 and 2339(A). Koubriti was convicted not only of that charge but of Conspiracy to Engage in Fraud and Misuse of Visas, Permits and Other Documents in violation of 18 U.S.C. §§ 371, 1546(a). See United States of America v. Koubrit et al., Case No. 01-80778, Doc. No. 367.

After the government concurred in his motion for a new trial, it moved to dismiss Count I of the Indictment--providing material support to terrorists--without prejudice. Defendant Convertino was the Assistant United States Attorney who prosecuted Plaintiff.

II. FACTUAL BACKGROUND

According to the First Amended Complaint ("FAC"), on September 17, 2001, a group task force of agents from the Detroit Joint Terrorism Task Force (JTTF) searched an apartment and found evidence including a day planner containing sketches, a videotape, and numerous arabic language audio tapes. FAC ¶ 10. On September 27, 2001, the grand jury issued an

indictment charging Plaintiff with document fraud. Thereafter, Convertino and Thomas began investigating Plaintiff's involvement in terrorist activities. Id. ¶¶ 13, 14. Plaintiff alleges that Convertino presented false evidence and perjured testimony to the grand jury and failed to disclose numerous facts that undermine the evidence presented at trial. Id. ¶ 15. On August 28, 2002, the grand jury issued a Second Superseding Indictment charging Plaintiff with terrorist-related activities. Id. ¶ 16.

Plaintiff proceeded to trial on the charges on March 26, 2003. At trial, the government alleged that the planner sketches of Queen Alia Jordan and the Incirlik Air Base and the videotape of tourists at the MGM Grand Casino in La Vegas, Disneyland, and some sites in New York were casing materials. Id. ¶ 18. Yousif Hnimssa, the witness who provided evidence against Koubriti, testified regarding Plaintiff's activities and corroborated the government's claims. Id. ¶ 19. Plaintiff was convicted and subsequently filed a series of motions seeking a judgment notwithstanding the verdict or a new trial, claiming that the prosecution team engaged in misconduct.

At a hearing on the motion, the presiding judge found that certain undisclosed documents should have been turned over to the defense. Id. ¶ 23. The government reviewed every document and concurred in Defendant's motion. Id. ¶ 24.

In Plaintiff's First Amended Complaint, he alleges that Defendants violated his Fifth Amendment rights by maliciously and intentionally withholding exculpatory evidence and fabricating evidence. The specific allegations against Convertino are that while

he was "acting in an investigative type role he withheld exculpatory evidence or fabricated evidence in Plaintiff's criminal case by:

> A. Failing to turn over photographs of the Queen Alia Hospital or ordering that they not be turned over to [Koubriti] or presented to the Grand Jury;
>
> B. Failing to disclose that none of the Defendants could establish which site or sites the sketches established (if either) after their respective trips to Jordan;
>
> C. Ordering or directing Defendant Thomas not to memorialize any of the ten to twenty interviews of Yousif Hnimssa[1] prior to the Second Superseding Indictment being issued; and
>
> D. Failing to disclose the Opinion of Air Force ASI SAS Goodnight to the Grand Jury or Plaintiff concerning the alleged Incirlik Air Base sketches.

FAC at ¶ 27.

III. STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the plaintiff must show that

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[1] A 302 is an FBI form used for reporting an interview with a potential witness or suspect or to record other actions taken by or observations of an agent.

his complaint alleges facts which, if proven, would entitle him to relief. First Am. Title Co. v. DeVaugh, 480 F.3d 438, 443 (6th Cir. 2007). "A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." Weiner v. Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997). When reviewing a motion to dismiss, the Court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" Bell Atl. Corp. v. Twombley, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007). "Under general pleading standards, the facts alleged in the complaint need not be detailed, although 'a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.'" Twombley, 127 S. Ct. at 1964-65.

IV. ANALYSIS

A. Are the Claims Advanced Against Convertino Barred by Absolute Immunity?

Convertino argues that his decision not to disclose evidence is "so intimately tied to the judicial process that it entitled him to the aegis of absolute immunity." Def.'s Br. at 16. The Supreme Court held that prosecutorial officials are absolutely immune from "suits for malicious prosecution and for defamation, and that this immunity extend[s] to the knowing use of false testimony before the grand jury and at trial." Burns v. Reed, 500 U.S. 478, 484 (1991). There is no question that the use of perjured testimony at trial

and the nondisclosure of exculpatory information are entitled to absolute immunity. Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986); Imbler v. Pachtman, 424 U.S. 409, 413 (1976). The Supreme Court protects the interest served by absolute immunity through a functional test. Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1995). Those functions more "intimately associated with the judicial phase of the criminal process" are more likely to merit careful consideration for absolute immunity. Id. In contrast, those functions more "investigative" in nature--searching for "clues and corroboration"--are more removed from the judicial process and merit only qualified immunity. Id. at 273. Accordingly, this Court must determine whether the allegations in this case in some way meet an "investigative" function.

At the outset of this determination, the Court observes that "[t]he line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw." Zahrey v. Coffey, 221 F.3d 342, 347 (2d Cir. 2000). The Court is not without guidance, however, because the Supreme Court "has identified 'evaluating evidence and interviewing witnesses' as falling on the absolute immunity side of the line, leaving 'searching for the clues and corroboration' that might lead to a recommendation for an arrest on the qualified immunity side." Buckley, 509 U.S. at 273. Moreover, an examination of the juncture in the criminal process wherein the claims arise may be helpful inasmuch as Buckley suggests that a prosecutor's conduct prior to the establishment of probable cause should be considered investigative. The Court noted, "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." Buckley, 509

U.S. at 274. Accord Zahrey, 221 F.3d at 347 n. 2; see also Hill v. City of New York, 45 F.3d 653, 661 (2d Cir. 1995) (observing that "[b]efore any formal legal proceeding has begun and before there is probable cause to arrest, it follows that a prosecutor receives only qualified immunity for his acts").

Nevertheless, the mere probable cause determination does not guarantee a prosecutor absolute immunity from liability for all subsequent conduct. Even after that determination, a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." Buckley, 509 U.S. at 274 n. 5; Zahrey, 221 F.3d at 347 n. 2 ("All members of the Court [in Buckley] recognized ... that a prosecutor's conduct even after probable cause exists might be investigative."). For instance, in interpreting Buckley, the Second Circuit has distinguished between "preparing for the presentation of an existing case" and attempting to "furnish evidence on which a prosecution could be based," Smith v. Garretto, 147 F.3d 91, 94 (2d Cir. 1998). Only the former entitles a prosecutor to absolute immunity. Id.

Following the Supreme Court's direction, this Circuit instructs courts to the "nature of the function performed" in evaluating whether to extend absolute immunity. Gregory v. City of Louisville, 444 F.3d 725, 738 (6th Cir. 2006). In Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003), the Sixth Circuit offered clarification as to when a prosecutor's conduct implicates his advocacy role and when it implicates administrative or investigative functions. Conduct occurring in the advocacy role includes: malicious prosecution, id. at 797 (citing Burns, 500 U.S. 478, 485 n. 4); "appearances at probable cause and grand jury

hearings," (citing Burns, 500 U.S. 478, 487, n. 8); "professional evaluation of the evidence assembled by the police, and appropriate presentation of that evidence at trial or before the grand jury after a decision to seek an indictment has been made," (citing Buckley, 509 U.S. at 273); "preparation of witnesses for trial," (citing Higgason v. Stephens, 288 F.3d 868, 878 (6th Cir. 2002)); and "knowing presentation of false testimony at trial," (citing Imbler, 424 U.S. 409, 413, 430; Buckley, 509 U.S. 259, 267 n. 3)).

Prosecutorial conduct that occurs as part of an administrative or investigative function includes: "giving legal advice to police," Spurlock, 330 F.3d at 798 (citing Burns, 500 U.S. 478, 496); "authorizing warrantless wiretaps in the interest of national security," (citing Mitchell v. Forsyth, 472 U.S. 511, 520 (1985)); making statements "in an affidavit supporting an application for an arrest warrant," (citing Fletcher v. Kalina, 522 U.S. 118, 139 (1997)); and making "out-of-court statements" at a press conference, (citing Buckley, 509 U.S. 259, 277-78).

Here, several of the specific allegations fall within the absolute immunity doctrine. For example, Plaintiff asserts in Paragraph 27A, that Convertino ordered that photographs of the Queen Alia Hospital "not be turned over to [Koubriti] or presented to the Grand Jury." This conduct falls within his role as advocate for the government. Likewise, Paragraph 27 D, includes the allegation that Convertino "[f]ail[ed] to disclose the Opinion of Air Force ASI SAS Goodnight to the Grand Jury or [Koubriti] concerning the alleged Incirlik Air Base sketches." See FAC. Nevertheless, absolute immunity does not necessarily protect misconduct that took place in the course of, participation in, and

supervision of the criminal investigation. Conduct that occurred after Koubriti was indicted for document fraud, while the government was investigating alleged terrorist activities, conceivably falls into police type investigatory activities. For example, Plaintiff alleges in Paragraph 27C that Coverntino "[o]rder[ed] or direct[ed] Defendant Thomas not to memorialize any of the ten to twenty interviews of Yousif Hnimssa[2] prior to the Second Superseding Indictment being issued." The instruction by Convertino not to record witness interviews, falls outside the bounds of trial preparation. See McCray v. City of New York, Nos. 03 Civ. 9685, 03 Civ. 9974, 03 Civ. 10080, 2007 U.S. Dist. LEXIS 90875, at *59 (S.D. N.Y. Dec. 11, 2007) ("[I]f a prosecutor acts in an investigative capacity, for example; or gives police legal advice on the propriety of investigative techniques and on whether or not probable cause exists to make an arrest ... then absolute immunity cannot be invoked.") (citing Buckley, 509 U.S. at 270-71); Thompson v. Gentz, No. 06-CV-1743, 2007 U.S. Dist. LEXIS 29753, at *4-*5 (E.D. N.Y. Apr. 23, 2007) (vacating prior order granting absolute immunity to prosecutor in part because "prosecutor [was] not entitled to absolute immunity when supervising and interacting with law enforcement agencies in acquiring evidence that might be used in a prosecution") (citing Barbera v. Smith, 836 F.2d 96, 100 (2d Cir. 1987)); Amaker v. Coombe, No. 96 Civ. 1622, 1998 U.S. Dist. LEXIS 14523, at *21 (S.D. N.Y. Sept. 16, 1998) (denying absolute immunity

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[2] Hnimssa changed his story repeatedly during the course of the investigation--a fact never revealed to Koubriti. Nor could a paper trail of his vacillating statements be provided because Convertino instructed the FBI agents not to record statements.

to prosecutor who 'provide[d] legal advice to the police" during investigation); see also Mink v. Suthers, 482 F.3d 1244, 1260 (10th Cir. 2007) (holding that "[a]dvising police on interrogation methods or the existence of probable cause does not qualify" prosecutors for absolute immunity) (citation and quotation marks omitted); Genzler v. Longanbach, 410 F.3d 630, 641 (9th Cir. 2005), cert. denied, 2005 U.S. LEXIS 8597 (Nov. 28, 2005) (denying absolute immunity to prosecutors who were "actively directing police-type investigative actions," including witness interviews). Accord McGhee v. Pottawattamie county, 514 F.3d 739 (8th Cir. 2008) (affirming the denial of qualified immunity to a county attorney who "obtain[ed], manufactur[ed], coerc[ed] and fabricat[d] evidence before filing formal charges").

In addition, the allegation advanced in ¶ 27 B, that Convertino "[f]ail[ed] to disclose that none of the Defendants could establish which site or sites the sketches established (if either) after their respective trips to Jordan" is one that focuses on Convertino's actions as an investigator--covering his trip to Jordan, and therefore it conceivably falls outside the scope of absolute immunity.

Finally, Convertino maintains that to make a valid claim Plaintiff must show that Convertino suppressed evidence favorable to Plaintiff, either because it was exculpatory or because it was impeaching, which resulted in prejudice to Plaintiff. Because the suppression must have prevented 'he effective use of the evidence at trial, Convertino concludes that he is entitled to absolute immunity. He argues, "It is [ ] difficult to conceive how Defendant Convertino could have suppressed or withheld e:.dence in a manner

that prevented its "effective use at trial" some 15 months before trial even began." Def.'s Br. at 25. In sum, the passage of time between his trip to Jordan and the alleged suppression of evidence entitles him to absolute immunity.

The Court rejects Convertino's contention that it is only the use of this evidence, not its procurement that violates Koubriti's substantive due process rights. Immunity cannot extend to actions by a prosecutor that violate a person's substantive due process rights by obtaining, manufacturing, coercing or fabricating evidence before filing formal charges, even if the subsequent use of that evidence is protected by absolute immunity. If the Court were to accept this argument, it would render meaningless, the Supreme Court's refusal to extend absolute immunity to prosecutors accused of fabricating expert evidence when the prosecutors were acting in an investigatory fashion rather than as advocate. See Buckley, 509 U.S. at 275. Moreover, courts have recognized that absolute immunity cannot "relate backwards to protect [a defendant] for any activities he allegedly engaged in" prior to the attachment of immunity. Gregory v. City of Louisville, 444 F.3d 725, 738 (6th Cir. 2006). Just as "[s]ubsequent testimony cannot insulate previous fabrication of evidence" for a defendant witness, absolute immunity provided to a prosecutor for conduct in his advocacy role cannot insulate a prosecutor defendant for conduct engaged in prior to conduct relating to trial preparation." Id. at 739. Long standing authority in this circuit has recognized that the doctrine of absolute immunity would not protect an official accused of falsifying nontestimonial evidence. Alioto v. City of Shively, 835 F.2d 1173, 1174, n. 1 (6th Cir. 1987). Further, the panel in Spurlock found that

efforts to persuade a witness to lie were nontestimonial acts, regardless of the connection to the witness' later testimony. 167 F.3d at 1002.

Because he is "the official seeking absolute immunity," Convertino "bears the burden of showing that such immunity is justified for the function in question." Buckley, 509 U.S. at 269. Only qualified immunity applies to law enforcement officials, including prosecutors, when they perform investigative functions. Id. at 273 "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." Id. (internal quotation marks and citations omitted); Accord Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000); See also Giuffre v. Bissell, 31 F.3d 1241, 1253 (3d Cir. 1994) (refusing to grant absolute immunity to a prosecutor who advised the police chief regarding forfeiture negotiations).

In sum, the factual development of these allegations are needed in order to assess how best to categorize them. Neither party has directed the Court to a case on all fours factually, and the Court finds dismissal at this procedural juncture is premature.

B. Is Plaintiff's Fifth Amendment Due Process Claim Cognizable?

The parties dispute whether Plaintiff states a claim upon which relief can be granted. A Bivens action is a judicially-created remedy designed to provide individuals with a cause of action against federal officials who have violated their constitutional rights.

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a cause of action against individual federal officers for violations of the Fourth Amendments protection against unreasonable search and seizures. It reaching this holding, the Court noted that "no special factors counsel[ed] hesitation in the absence of affirmative action by Congress" and there was no "explicit congressional declaration that person injured by a federal officers' violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Id. at 396, 397.

Although the Supreme Court has rarely recognized nonstatutory damages remedies post Bivens, in Davis v. Passman, 442 U.S. 228 (1979), it allowed a claim for employment discrimination in violation of the Due Process Clause, and in Carlson v. Green, 446 U.S. 14 (1980), it recognized a claim in the context of an Eighth Amendment violation by prison officials. The remedy has been limited to those violations that require a "judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a Bivens remedy unjustified." Id.

Here, the Court must decide whether a Bivens action is cognizable for a violation of an individual's Fifth Amendment due process rights. Plaintiff relies on Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000), as support for his position that the claim is recognized. In Zahrey, the plaintiff sued New York police officers and county prosecutors for conspiring to manufacture false

evidence against him. The court found a constitutional due process right against the fabrication of evidence where a deprivation of liberty is alleged. Id. at 344 (holding that "there is a constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty").

Convertino posits that a Bivens remedy has never been applied to a claim based on a violation of United States v. Brady, 373 U.S. 83 (1963). In Brady, the Supreme Court established the principle that a prosecutor is required under the Fifth Amendment to disclose exculpatory evidence to the accused in connection with trial proceedings, and the failure to do so when the evidence is material to either guilt or punishment violates due process. Id. at 87. The Court does not read the fact that Brady's scope is limited to trial to mean that Koubriti has no constitutional claim at all. Regardless of how it is categorized, at its heart, Plaintiff's claim is that he was wrongfully convicted without due process of law. Such a claim has not been rejected out of hand. See e.g. Brown v. Daniel et al., Nos. 99-1678, 1679, 1680, 2000 WL 1455443 (4th Cir. September 29, 2000) (addressing a Brady claim brought under Bivens); King v. Fuller, No. 4:08-CV-36, 2008 WL 4613076 (E.D. Tenn October 15, 2008) (discussing the previous dismissal of a prisoner plaintiff's Bivens action, in which he alleged among other things that the defendants withheld exculpatory evidence in violation of Brady and impeachment evidence in violation of Giglio v. United States, 405 U.S. 150 (1972) because the prisoner's convictions had not been vacated).

The Court therefore declines to declare Plaintiff's claim dead on arrival and instead considers the factors identified by the Supreme Court as relevant in ascertaining the viability of the remedy. First, the court considers whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Bush, supra, at 378. Absent a convincing reason to refrain, the court considers "any special factors counseling hesitation before authorizing a new kind of federal litigation." Id.

Convertino maintains alternative processes exist to protect Plaintiff's interests and other special factors weigh against recognizing a Bivens remedy. Accordingly, the Court directs its attention to the existence of alternative processes to protect Koubriti's interest.

1. Alternative process

Although Convertino raises many options available to Koubriti, the shortcomings with those advanced prevent the Court from embracing his position that a remedy under Bivens is not justified. First, many of the alternatives raised are not relevant under the circumstances presented. Further, these processes are easily distinguished from circumstances that must be measured against a comprehensive remedial scheme devised by Congress, for example in the Social Security Act or the Internal Revenue Code.

The first remedies for wrongful conviction identified by Convertino are a Motion for Judgment of Acquittal pursuant to FED. R. CRIM. P. 29(c) and a

Motion for New Trial, pursuant to FED. R. CRIM. P. 33. Defendant contends that Plaintiff pursued these avenues of relief and his conviction was overturned. Therefore, Defendant concludes that the Court should refrain from allowing a new remedy.

At the outset, the Court notes that Plaintiff did not really win acquittal. The government merely dismissed one count of the Second Superseding Indictment without prejudice. Nor does the Court find the Federal Rules of Criminal Procedure constitute a sufficient "alternative process." If that were the case, Bivens would have been decided differently because the injured party could have used the criminal procedural rules, which allow a criminal defendant to file a motion to suppress evidence in the event of wrongful search and seizure.

Next, Defendant notes that Plaintiff had the option of filing a Request for Investigation with the Michigan State Bar Association or a complaint with the U.S. Dept. of Justice, Office of Professional Responsibility. See Mich. Ct. R. 9.112; 28 U.S.C. 530B(a), 28 C.F.R. § 77.3, and 28 C.F.R. § 0.39a, Attorney General Order No. 1931-94. Although these options provide an avenue for punishment of Convertino, they do not provide an avenue of relief to Plaintiff.

Defendant also points to Plaintiff's option of filing a motion for reimbursement of attorney fees through § 617 of the Hyde Amendment, Pub.L. No. 105-199, § 617, 111 Stat. 2519 (18 U.S.C. § 3006A). Because recovery of attorney fees is such a minimal part of the damages resulting from the criminal prosecution that occurred here, the Court 15 finds it does not constitute an alternative process mandating restraint.

Likewise, the Court rejects Convertino's argument that damages resulting from an unjust conviction and imprisonment could be remedied through a statutory malicious prosecution action or a state claim for a violation of the Michigan Constitution. This argument ignores the fact that Convertino has immunity for his actions as a prosecutor, and consequently, these options provide no avenue of relief to Plaintiff.

Lastly, Defendant relies on 28 U.S.C. § 2513(e), which provides an action for unjust conviction and imprisonment. Under the statute, a person suffering from an unjust conviction and imprisonment for a noncapital offense may recover up to $50,000 for each 12-month period of unjust incarceration. The person suing must have had his conviction reversed or set aside on the ground that he is not guilty of the offense or on a new trial where he was found not guilty. That is not what happened to Koubriti, and it does not appear that this statute applies.

In sum, the Court finds that those considerations requiring restraint are not present. Consequently, it considers, the second factor.

2. Other factors counseling hesitation

Defendant maintains that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties. . .and shade his decisions instead of exercising the independence of judgment required by his public trust." Def.'s Br. at 13 (quoting Imbler v. Pachtman, 424 U.S. 409, 423 (1976). This argument only holds weight relative to actions Convertino took as a prosecutor. That conduct that remains at issue is the

conduct he is alleged to have engaged in as an "investigator."

Defendant also argues that hesitation is required because Congress has articulated that compensation should be available only to those persons who are not guilty of the offence for which they were convicted or pardoned due to actual innocence. 28 U.S.C. § 2513(a)(1). Consequently, if the Court were to allow a judicially-created remedy to proceed, it would violate the separation of powers doctrine, which mandates deference to legislative policy choices. Defendant's argument is not persuasive, given the legislative history of § 2513(a)(1). It suggests that this provision arose out of DNA exonerations, not the type of circumstances presented here.

Finally, Convertino concludes that Koubriti's situation is analogous to the plaintiff's in Wilkie v. Robbins, 551 U.S. , 127 S. Ct. 2588, 2597 (2007). In Wilkie, the Court granted the defendants summary judgment on the plaintiff's Bivens claim. The Court concluded that "hard-bargaining" by the federal agents committing trespass, which included revoking permits and filing numerous administrative and criminal charges, was insufficient to establish Bivens liability. Id., 127 S. Ct. at 2600-05. Convertino notes the egregious nature of the conduct employed by the federal defendants was not dispositive. Specifically, after government officials discovered that a nonexclusive easement granted by a prior landowner to the government had not been recorded, they asked the current landowner for an easement. When he refused, the officials instituted and executed a plan of harassment that included trespassing, canceling a negotiated right-of-way, terminating the plaintiff's

special use permit, revoking the plaintiff's grazing permit, bringing administrative and criminal charges against the plaintiff, requesting other agency officials to impound the landowner's cattle, and videotaping the landowner's ranch guests to "catch" the landowner trespassing. Id. at 2594-2596.

Even as the Supreme Court recognized that various processes existed to "vindicat[e] virtually all of [the landowner's] complaints," it recognized that the "patchwork" of state and federal administrative and judicial proceedings applying statutes, regulations, and common law rules did not adequately remedy the whole of the officials' six-year course of conduct. Id. at 2600-01. Nevertheless, the Court found that imposing limits on government agents when engaging in necessary and legitimate "hard-bargaining" for a legitimate interest weighed against creating a Bivens remedy. Id. at 2601-02.

Koubriti's situation is distinguishable. Here, the government actor was not pursuing a legitimate interest. Further, the Court does not view the pursuit of a remedy for a violation of a property interest as analogous to the pursuit of a remedy for a violation of a liberty interest. Despite the limitations imposed on suits brought pursuant to Bivens, the Court finds at this stage of the proceedings, Plaintiff remains a candidate for Bivens relief. His Fifth Amendment claim against a federal officer is more closely aligned with the facts of Bivens. The Bivens doctrine has been extended to violations of the Fifth Amendment. See Davis v. Passman, 442 U.S. 228 (1979) (holding that the equal protection component of the Fifth Amendment's due process clause impliedly authorized recovery of damages from a Congressman for sex

discrimination in employment); Bishop v. Trice, 622 F.2d 349 (8th Cir. 1980) (reinstating a complaint alleging federal employees deprived the plaintiff of liberty without due process of law); Hill v. McMartin, 432 F. Supp. 99 (E.D. Mich. 1977) (Feikens, J.) (allowing a Bivens claim for deprivation of Fifth Amendment rights).

In sum, courts have allowed a Bivens action based on a violation of the due process clause of the Fifth Amendment. Regardless of whether Plaintiff can ultimately prevail, dismissing his law suit is not appropriate. Even if Plaintiff's legal theory is characterized as novel, the merits are best addressed after factual development.

V. CONCLUSION

In light of the foregoing, Defendant's motion is **DENIED**.

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Date: December 3, 2008

CERTIFICATE OF SERVICE

Copies of this Order were mailed and/or electronically filed to counsel of record on this date.

s/Bernadette M. Thebolt
Deputy Clerk